

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

MARTIN MARIETTA MATERIALS¹

Employer

and

Case No. 8-RC-15901

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 18**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The name of the Employer appears as amended at the hearing.

² Both parties waived the filing of post-hearing briefs.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All equipment operators and scale-house clerks employed by the Employer at its Martins Ferry, Ohio location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

The Employer, a North Carolina corporation, sells sand and gravel to various contractors. There are two employees in the unit found appropriate herein. The unit is in substantial conformity with the unit petitioned for by the Union.

The Petitioner contends that a unit including the one equipment operator and the one scale-house clerk is an appropriate unit.

The Employer asserts that the unit sought by the Petitioner is not appropriate for purposes of collective bargaining because of an insufficient community of interests between the equipment operator and the scale-house clerk. Specifically, the Employer asserts that their duties and responsibilities are different and that their job skills are different. Accordingly, the Employer made a motion at the hearing to dismiss the petition, since the unit consists of only one employee, in its view. In light of my decision, I deny that motion.

John Michael Hays testified that he is the Employer's general manager for the West Virginia area. Hays was the principal witness at the hearing. He indicated that stone, sand and gravel is transported to the Martins Ferry location by a tow boat and barge. The material is then unloaded by conveyors onto the site. Customers purchase the sand, stone and gravel by the truck load, which is weighed as the vehicles proceed across the scales. The Employer employs a three man crew to operate the conveyors during the unloading operation. This crew rotates among the

many sites that the Employer utilizes for stockpiling the gravel, sand and stone, and is not at issue in this proceeding. Local 132 of the Operating Engineers represents the conveyor crew.

At the Martins Ferry “sales yard” the loader operator loads the trucks, keeps the yard level, and greases and maintains the loader. The loader is a 980 “CAT” rubber tire loader with a seven cubic yard capacity bucket. Ken Whytiaz supervises both the front end loader operator and the scale-house clerk.

The scale-house clerk, Nancy Whitlach, utilizes a fax machine, telephone and computer in the performance of her work. The scale-house clerk usually works an eight hour day, five days a week. Typically, the front-end loader operator, Leroy Hostuttler, works eight hours a day, five days a week, plus overtime when needed. The clerk rarely works overtime, whereas the operator will often stay over to blend materials in the evening or on a Saturday.

The scale-house clerk does not blend materials or operate the front-end loader. She does have customer contact. Customers telephone her with requests for different types and amounts of materials. The clerk then quotes a price to the customer. She also has arranged for trucking companies to deliver material to the customer.

The scale-house clerk is responsible for all of the administrative duties associated with the sales yard. She keeps track of the inventory, receives the sales orders, and maintains a record of daily sales.

Hays testified that the scale-house clerk is temporarily laid-off during the slow, winter months, usually January through March. During that time the front-end loader operator is responsible for running the computer. The operator has few administrative duties to attend to during the winter months because the vast majority of the sales are to regular customers, usually “concrete” customers.

Both employees are paid hourly. Additionally, both employees enjoy the identical package of benefits, including health insurance. The two employees stay in contact via two-way radio. Ken Whytiaz is at the sales yard on a daily basis to supervise Whitlach and Hostuttler, the clerk and operator. During the winter months the operator will handle the tickets for the scales and make bank deposits when necessary. Each of the two employees is also required to attend the Employer's annual safety training.

The Employer introduced two exhibits into the record which show that the operator receives two dollars more per hour than the scale-clerk. Both have keys to the office.

Garry Lisec, the employer's Vice President of Employee Relations briefly testified at the hearing. Lisec testified that scale-house clerks are not included in any other Martin Marietta bargaining unit. The Employer, however, failed to introduce any exhibits to corroborate Lisec's representation. The Petitioner introduced three contracts into the record, each of which is a current collective bargaining agreement between another employer in the industry and Local 18. Each of the three bargaining units includes the scale-house clerk.

The Appropriate Unit

The Board's role in making a unit determination is to determine "an appropriate unit" and not necessarily the "most appropriate unit." **Saltwater, Inc.**, 324 NLRB 343, 346 (1997); **Overnite Transportation Co.**, 322 NLRB 723 (1996). The facts of the instant case make it obvious that either a unit including the scale-house clerk and the front-end loader operator is appropriate, or there is no unit, since only two employees work at the Martins Ferry location, and it is contrary to Board policy to certify a representative for bargaining purposes in a unit consisting of only one employee. **Mount St. Joseph's Home for Girls**, 229 NLRB 251, 252 (1977).

Recently, the Board included “log scalers” in a unit of production and maintenance employees. **Hankins Lumber Co., 316 NLRB 837, 849 (1995)**. Significantly, the employees who weighed the trucks and prepared the scale tickets were included with the lift operator who unloaded the trucks. **Ibid, p. 849**. The Board further noted that the unit employees and the scalers all received the same vacation, pension and other benefits. Finally, the Board observed that the scaler’s pay was within the range paid to other unit employees. Similarly, in the case before me, the scale-house clerk and the front-end loader operator receive the same benefit package and receive wages which are not significantly different.

The Board has a long tradition of including scale-house clerks in units of production and maintenance employees. See, **Worth Steel Company, 53 NLRB 168, 171 (1943)**. When the Board has excluded clerks in the scale-house, it has done so at the Union’s request, in the context of a much larger production unit, and where the number of clerks would potentially allow for the establishment of their own separate unit. **J.G. Boswell Company, 47 NLRB 879, 882 (1943)**. Even when a union has sought to exclude scale-house clerks the Board has decided to include them in a unit of production and maintenance employees because their “interests and contacts ally them more closely to the production workers than to the employees who are part of the company’s office clerical staff.” **Aluminum and Magnesium, Incorporated, 62 NLRB 477, 479 (1945)**.

Both parties, as noted above, offered some evidence at the hearing, of the bargaining pattern in the stone, gravel and sand industry. The Board, however, has never considered such a pattern to be controlling in relation to the bargaining unit of a particular plant. **Big Y Foods, Inc., 238 NLRB 855, 857 (1978)**. Moreover, there is no clear pattern of bargaining in this

industry. Accordingly, I have relied primarily on the evidence involving this facility, rather than any bargaining pattern, in making the unit determination.

Notwithstanding the Employer's argument that the scale-house clerk and the front-end loader operator normally engage in different functions, I conclude, based on the entire record, that a sufficient community of interest exists between these two employees as to warrant their inclusion in the unit found appropriate herein. Not only do they share common supervision and benefits, but the front-end loader operator performs most of the clerical duties, during the wintertime, when the scale-house clerk is seasonally laid-off. My finding is consistent with Board precedent in these circumstances where there is no bargaining history at the facility. **Hankins Lumber Co.**, supra; **Worth Steel Company**, supra.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an

economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Union of Operating Engineers Local 18**.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Co.**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by June 18, 1999.

Dated at Cleveland, Ohio this 4th day of June 1999.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

420-1200
420-2900